No. 95-2074

Supreme Court, U.S.
FILED
JAN 16 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
AND
UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") has represented the interests of the Orthodox Jewish community in the United States for more than thirty years. We have filed *amicus curiae* briefs in this Court in many of the leading cases involving the Religion

Clause of the First Amendment.[1] In this case we are filing this brief on behalf of various organizations that have advocated the interests of the Orthodox Jewish community over the years. They include:

(1) Agudath Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

(2) National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

(3) The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

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[1] *See, e.g., Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *TWA v. Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Corporation of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lee v. Weisman*, 505 U.S. 577 (1992); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Board of Education of the Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994).

(4) The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply involved in issues related to religious freedom.

(5) Torah Umesorah-National Society of Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States.

(6) The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

COLPA and several of the above organizations have also joined the *amicus curiae* brief of the Coalition for the Free Exercise of Religion. While we fully endorse the legal position stated in that brief, we are also filing separately to present the distinctive experiences that have affected Orthodox Jews in the United States and explain the singular importance to our community of a law such as the Religious Freedom Restoration Act.

ARGUMENT

I

THE RELIGIOUSLY OBSERVANT JEWISH COMMUNITY IN THE UNITED STATES NEEDS A BROAD DECLARATION OF PRINCIPLE PROTECTING RELIGIOUS FREEDOM TO ENABLE IT TO ENGAGE FULLY IN THE FREE EXERCISE OF RELIGION

We address first the practical impact of the Religious Freedom Restoration Act as attorneys who are regularly engaged in protecting the rights of a religious minority to observe the dictates of its faith. Orthodox Jews have unique religious observances affecting their dress (*e.g.*, the wearing of yarmulkes), their diet (*e.g.*, the obligation to eat only kosher food), and their work schedules (*e.g.*, the prohibition against work on Sabbaths and certain holidays). These observances are often impeded or even prohibited by neutral, generally applicable laws that have a disproportionate impact on members of the Orthodox Jewish community.

Prior to this Court's decision in *Employment Division, Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), the existence of the constitutional rule in *Sherbert v. Verner*, 374 U.S. 398 (1963), was an important tool in preventing arbitrary discrimination against Orthodox Jews who are employed by governmental agencies or otherwise affected by governmental action. Whenever a government agency refused to make a reasonable accommodation to the religious needs of an Orthodox Jewish employee, a volunteer attorney for the employee could, in negotiations with the government agency, invoke the rule of *Sherbert v. Verner*. Many accommodations were achieved on this basis through simple negotiation.

Once *Smith* was decided, this tool became unavailable. The governing rule — until the enactment of the Religious Freedom Restoration Act — was that no accommodation was required when a neutral, generally applicable rule impeded or prohibited the free exercise of religion. Enactment of the Religious Freedom Restoration Act has restored this negotiating tool, and has made government officials more amenable to the reasonable accommodation needed if a public school schedule, for example, conflicts with the observance of Yom Kippur or some other religious holiday.

When this Court observed in its *Smith* opinion that it had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation" (494 U.S. at 883), it was looking *only* to the reported decisions of this Court. In fact, the *Sherbert* test was useful in hundreds of situations that never resulted in litigation, much less in a case that came to this Court. It had very beneficent results in overcoming irrational and unjustified discrimination by government agencies against Sabbath observance or against wearing a yarmulke or following prescribed dietary laws.

For this reason, we view it as essential for the continued vigor of Orthodox Jewish observance to have a broad overriding principle of law — be it Constitutional or statutory on a federal level — that directs government officials to be mindful of the religious observances of those who are subject to governmental authority — whether as employees or in some other capacity. The *Smith* case has authoritatively declared that the First Amendment does not, of its own force, protect the religious observance of Orthodox Jews from neutral generally applicable laws that impede or prohibit religious observances, but the federal

statutory policy of the Religious Freedom Restoration Act provides the national moral imperative of religious tolerance.

II

THE FIRST AMENDMENT IMPLIEDLY GIVES CONGRESS PLENARY POWER TO PROTECT THE FREE EXERCISE OF RELIGION

We turn now to the constitutional basis for this declaration of national policy. We begin with the first sixteen words of the Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The disjunctive "or" separates two types of laws that Congress is prohibited from enacting:

(1) a law "respecting an establishment of religion"

and

(2) a law "prohibiting the free exercise" of religion.

"Establishment of religion" is a subject prohibited to Congress regardless of which side the legislation takes. Consequently, any law "respecting" an establishment of religion is banned whether it encourages or discourages religion. The subject of "free exercise" is not similarly beyond the power of Congress. Only a law "*prohibiting* the free exercise" of religion is out-of-bounds. A law "protecting," "safeguarding," or "guaranteeing" the free exercise of religion is impliedly permitted.

If the Founding Fathers had intended to prohibit Congress from enacting any law relating to the free exercise of religion — whether such a law protected or prohibited religion — they would have chosen different language than now appears in the Religion Clause. The First Amendment could have read: "Congress shall make no law respecting an establishment of religion or the free exercise thereof." The word "prohibiting" that appears between the words "or" and "the" indicates that with regard to free exercise, only prohibition or restriction by law is constitutionally forbidden. Legislation that protects or defends free exercise of religion is constitutionally permissible.

It is a well-established principle of constitutional law that *every* word of the Constitution must be given "due force." The following observation made in *Holmes v. Jennison*, 14 Pet. (39 U.S.) 540, 570-71 (1840), was quoted in large part and reaffirmed in *Williams v. United States*, 289 U.S. 553, 572-73 (1933), and in *Wright v. United States*, 302 U.S. 583, 588 (1938):

> In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the

> instrument, therefore, can be rejected as superfluous or unmeaning. . . .

We contend that the First Amendment gives Congress plenary power to protect or secure the free exercise of religion, even while the Free Exercise Clause deprives it of power to "prohibit" or discourage religion. The Religious Freedom Restoration Act is, therefore, a permissible exercise of Congressional power because it secures rather than prohibits the free exercise of religion.

We recognize that this interpretation of the Free Exercise Clause — *i.e.*, as not merely denying Congress authority to enact legislation impeding religion but also authorizing governmental regulation to protect religion — is novel and is not supported by any judicial precedent. It is, nonetheless, supported by the language of the First Amendment and by the policies that the Free Exercise Clause was designed to implement.

It is also comparable to other constitutional authority that this Court inferred from a similar negative command in the Constitution. Article I, Section 9 declares that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended . . . ." The Constitution does not explicitly give Congress authority to legislate rules or standards governing the writ of habeas corpus. Nonetheless, in *Prigg v. Pennsylvania*, 16 Pet. (41 U.S.) 539, 619 (1842), Justice Story observed that although no express power to legislate regarding the Great Writ is enumerated in the Constitution, the authority to enact such legislation is "deemed by necessary implication within the scope of the legislative power of Congress." The same is true of the power of Congress to legislate to protect the free exercise of religion.

It may be argued that the Religion Clause's ban against Congress' making any law "prohibiting the free exercise" of religion is designed to invalidate a law that is otherwise within Congress' enumerated powers if it has the effect of prohibiting free exercise. Such a reading is not, however, consistent with the choice of words made by the Founding Fathers. The First Amendment does not say "No law prohibiting the free exercise of religion shall be passed" — the format chosen for prohibiting bills of attainder or ex post facto laws. Instead, the Constitution utilizes the active voice — "Congress shall make no law . . . ." That language appears implicitly to authorize the "making" of a law other than the type that the Religion Clause bars.

To be sure, the same rationale would authorize Congress to enact legislation to protect the other freedoms secured against "abridgement" in the First Amendment — *i.e.*, "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Just as Congress is authorized to enact a law that protects, rather than "prohibits," the free exercise of religion, it would be empowered to enact a law that secures, rather than "abridges," freedom of speech or of the press. In each case, of course, Congress' power extends only to state action, which is the conduct defined by the Constitution, and not to the acts of private parties. And in each case, Congress may legislate to safeguard the liberty defined in the First Amendment while it is prohibited from legislating to prohibit or abridge that right.

III

LEGISLATION PROTECTING THE FREE EXERCISE OF RELIGION WAS CONTEMPLATED AND APPROVED BY THIS COURT IN ITS *SMITH* DECISION

When Congress enacted the Religious Freedom Restoration Act in 1993, it was doing precisely what this Court invited in its decision in *Employment Division, Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). The district court in this case wholly misunderstood the meaning and significance of this Court's opinion in *Smith* when it said that the Congressional legislation was impermissible because it was "unconstitutionally changing the burden of proof" established under *Smith*. 877 F. Supp. at 358. In fact, Congress was assuming the obligation that this Court said in *Smith* was the duty of the legislature.

The Court's opinion in *Smith* concluded with a paragraph that contributed significantly to the result the Court reached. The Court observed that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." 494 U.S. at 890. On this account, said the Court, accommodation to religious needs should be left "to the political process." *Id.* The Court recognized that the important values of the Free Exercise Clause enshrined in the Bill of Rights could be "protected against government interference" by "the political process." *Id.*

The Court surely did not mean that *only* state legislatures could protect those important national values. Expressing the majority's will, Congress directed that national policy should protect religious minorities, to the extent specified in the Religious Freedom Restoration Act,

against the effect of "generally applicable laws" that are neutrally applied. That expression of popular will is entitled to great respect. Rather than "overruling" this Court's decision in *Smith*, that resort to "the political process" *implements* this Court's decision.

What the district court and those who are challenging the constitutionality of the Religious Freedom Restoration Act fail to understand is that the Court did *not* say in *Smith* that religious exercise in the United States must forever be subordinated to any neutral, generally applicable law. The Court said only that the Constitution, as interpreted by the Judicial Branch of government, does not, in and of itself, protect religious minorities from the effect of generally applicable laws. But a legislature in a representative democracy may enact a law that protects the free exercise of religious minorities against the harmful effects of generally applicable laws. The *Smith* decision, we believe, invites and approves such legislation.

The critical lesson of *Smith* relates to the branch of government that effectuates the right of free exercise. *Smith* says that judges do not have the responsibility, under the First Amendment and its Free Exercise Clause, of devising religious exceptions to generally applicable laws. And the Court cites a long string of judicial decisions to demonstrate that, regardless of lip-service given to the implementation of the standard of *Sherbert v. Verner*, 374 U.S. 398 (1963), the courts — and most notably this Court — has frequently failed to uphold the claims of religious minorities. The job, according to the *Smith* Court, is more appropriately the legislature's.

This Court's decisions construing Congress' power under Section 5 to enforce the commands of the Fourteenth Amendment support enactment of the Religious Freedom

Restoration Act. The court of appeals in this case (73 F.3d at 1357) was entirely correct in its analysis of *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Those decisions support the authority Congress exercised under Section 5 of the Fourteenth Amendment to pass the challenged law.

IV

LEGISLATION HAS ROUTINELY BEEN ENACTED TO PROTECT RELIGIOUS RIGHTS DENIED BY THE COURTS

We note, finally, that the Religious Freedom Restoration Act follows the path trod in other instances in which this Court denied a claim to rights under the Free Exercise Clause. Although the Court held in *Braunfeld v. Brown*, 366 U.S. 599 (1961), that Orthodox Jews had no constitutional right to keep their stores open on Sunday if they were closed on Saturday for religious reasons, various state legislatures did provide exemptions. 20 Mass. Gen. Laws Ann. ch. 136, § 6(8) (West 1996); N.D. Cent. Code § 12.1-30 (1995); S.C. Code Ann. § 53-1-160(F) Law (Co-op. 1995). Following this Court's rejection of the constitutional right to wear a yarmulke in the military (*Goldman v. Weinberger*, 475 U.S. 503 (1986)), Congress enacted a law requiring the armed services to permit "religious headgear" to be worn. 10 U.S.C. § 774. After *United States v. Lee*, 455 U.S. 252 (1982), Congress repealed the mandatory social security tax obligation as it applied to religious employers and employees who specified that their religious observance would be infringed by payment of such taxes. 26 U.S.C. § 3127. And the American Indian Religious Freedom Act Amendments, 42

U.S.C. § 1996a, were approved by Congress to protect the religious rights of American Indians to ingest peyote during religious ceremonies after this Court's *Smith* decision rejecting the constitutional right to do so.

The Religious Freedom Restoration Act follows the same beaten path. To be sure, it is more sweeping and general in its terms, but its effect is the same. It implements a legislative policy that fills a gap created by this Court's decision that religious observance is not protected by the Constitution itself. That is a permissible constitutional course, and it should be approved by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals sustaining the constitutionality of the Religious Freedom Restoration Act should be affirmed.

Respectfully submitted,

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